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**CHARLES ELMORE DROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 965

H. L. MOSHER,

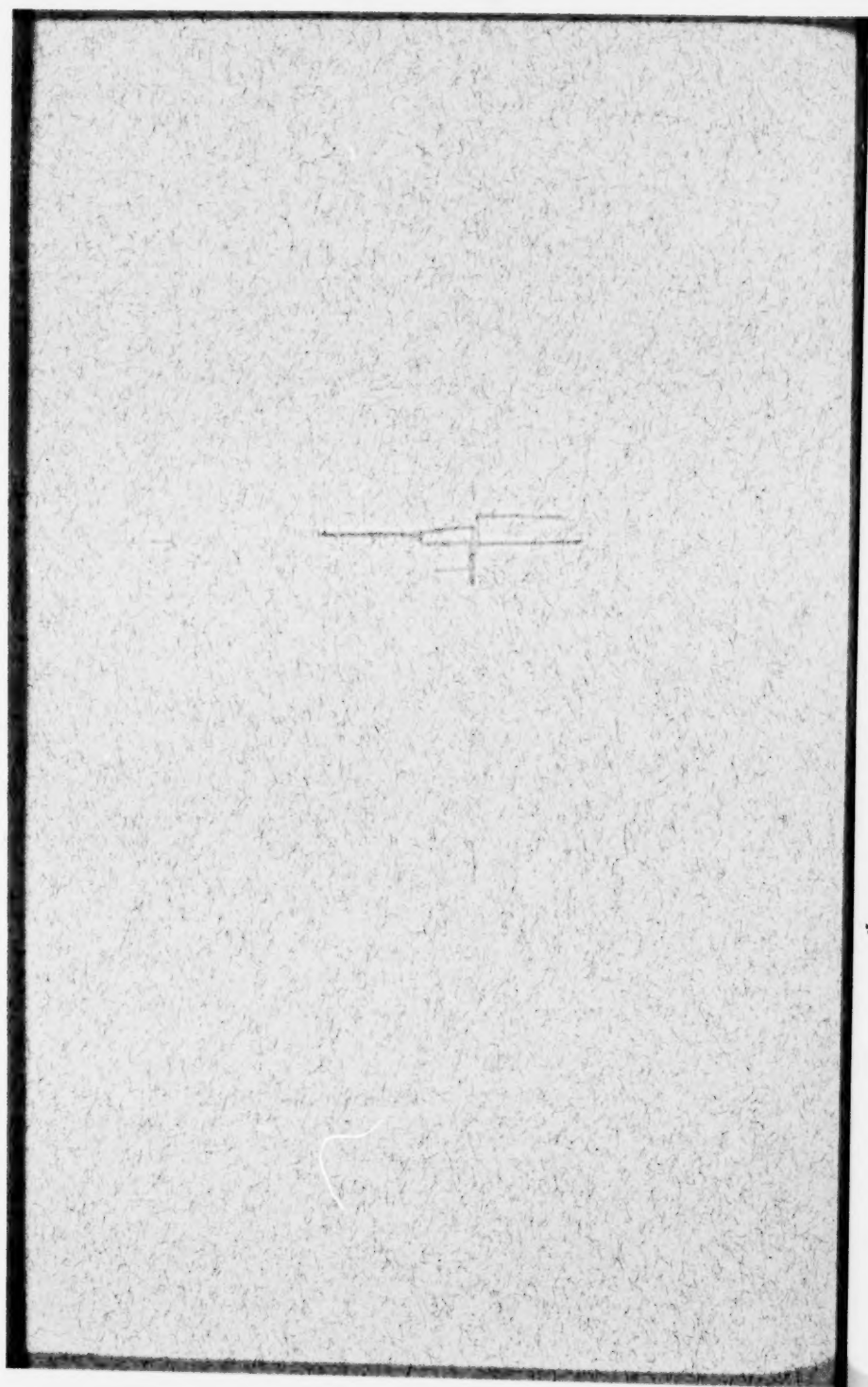
Petitioner,

vs.

**W. R. WAYLAND, FRED G. HOLMES, AND DEL E.
WEBB**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA
AND BRIEF IN SUPPORT THEREOF.**

THOS. O. MARLAR,
Counsel for Petitioner.



INDEX

SUBJECT INDEX

| | Page |
|---|------|
| Petition for writ of certiorari | 1 |
| Statement of matter involved | 2 |
| Statement of jurisdiction | 3 |
| Questions presented | 5 |
| Reasons relied on for allowance of the writ | 6 |
| Brief | 6 |
| Errors based on questions presented herein | 8 |
| Argument | 9 |
| Summary | 14 |
| Conclusion | 14 |

STATUTES CITED

| | |
|---|------|
| Arizona Code Annotated 1939, Vol. 1, p. 123 | 3 |
| Arizona Code Annotated, 1939, sec. 21-1702 | 13 |
| Arizona Code Annotated, 1939, sec. 62-101 | 5 |
| Arizona Code Annotated, 1939, Vol. 2, sec. 24-103 .. | 9 |
| Constitution of Arizona: | |
| Article VI, sec. 1 | 3 |
| Article VI, sec. 4 | 4 |
| Constitution of the United States, 14th Amendment .. | 4, 5 |
| Judiciary Act of 1789, as amended by Acts of January 31, and April 28, 1928 | 4 |
| Rules of Civil Procedure: | |
| Rule I | 11 |
| Rule I(c) | 11 |
| Rule VI | 11 |
| United States Code Annotated, Title 28, sec 344(b), | |
| Judicial Code, sec. 237 and sections 240 and 347 .. | 3 |

TEXT CITED

| | |
|---|----|
| Bancroft's Code Practice and Remedies, Vol. 8, p. 8329, par. 6270 | 13 |
|---|----|

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 965

H. L. MOSHER,

Petitioner,

vs.

W. R. WAYLAND, FRED G. HOLMES, AND DEL E.
WEBB,

Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA**

*To the Honorable Harlan F. Stone, Chief Justice, and to
the Associate Justices of the Supreme Court of the United
States:*

Your petitioner, H. L. Mosher, respectfully prays for a Writ of Certiorari to the Supreme Court of the State of Arizona and that it certify up to the Supreme Court of the United States for review all proceedings and records supporting, and relevant to, that order of the Supreme Court of the State of Arizona entered therein September 25, 1944.

The Supreme Court of the State of Arizona, being the highest court in the State, and the Court of Last Resort,

acting in that capacity, refused to consider, and rule upon, petitioner's appeal from a lower court that had entered an order denying to this petitioner further consideration of the act of the lower court which gave to the respondents land upon which they held absolutely no claim, nor lien upon, as a gift outright, as the petitioner owed the respondents nothing.

The respondents secured a deed from a Sheriff after the lower court had entered an order stating that the Sheriff's sale was merely a "PURPORTED SHERIFF'S SALE".

The Execution and Amended Execution sets forth a cost judgment in a Superior Court action that allowed no costs.

Statement of Matter Involved

The matter involved in this petition for a certiorari began with a praecipe for execution filed May 19, 1943. Although this execution was issued by the Clerk of the Superior Court it was never filed with him.

May 21, 1943—Respondents filed a Motion to amend the execution which the court granted the same day (R. 2).

July 17, 1943—The Execution, as Amended; the Sheriff's Return and the Receipt of respondents for \$148.45, signed by respondents' attorney was filed with the clerk (R. 6).

The execution called for a search for personal property first and if there was none to levy on real estate. The Return shows that no search was made for personal property but the real estate was immediately levied upon.

The execution set forth that the respondents recovered a judgment in the lower court on September 18, 194 of \$126.65. No such judgment ever existed. That was undisputed (R. 9). The respondents base their sole claim to the land on the fact that a judge, who was prohibited by the Supplemental Rules that went into effect July 1, 1943 (R. 21) from entering any order in the case at bar;

in defiance of all rules; entered an order CONFIRMING the illegal sale by the Sheriff August 2, 1943. This judge held a secret hearing of which no notice had been served on this petitioner (R. 26). This Confirming Order shows that no one but C. L. Strouss, attorney for the respondents, was present. December 8, 1943, the Court refused to set aside, what the court, itself, designated as a purported sale. (R. 26) December 27, 1943, the court entered an order that no additional consideration would be given to petitioner's attempt to save her land from confiscation. The appeal to the State Supreme Court was from this final, and definite, end of all of petitioner's efforts to save her land.

Statement of Jurisdiction

The Supreme Court of the United States has jurisdiction to review all proceedings brought in the County Courts and then appealed to the Supreme Court of Arizona; which is the Court of Last Resort in the State of Arizona, it being the Highest Court in the State; subsequent to May 19, 1943, when the instant case matter was instigated by an attempt to claim in an execution that a judgment for costs had been given to the respondents when the court records showed that the case had been dismissed and that no costs had been allowed to the respondents (R. 9). The City of Phoenix was in the original action and any claim they may have ever held against this petitioner has been liquidated. The City took no part in the case at bar.

The jurisdiction of the Supreme Court of the United States is invoked by

United States Code Annotated, Title 28, Section 344 (b), being Judicial Code Section 237, Amended. Also Section 240 and 347.

Arizona Code Annotated 1939, V. 1, P. 123; the Constitution of Arizona, Article VI, Section 1; and at

page 125, of said Arizona Code Annotated 1939; and the Constitution of Arizona, Article VI, Section 4. Judiciary Act of 1789, as amended by Acts of January 31, and April 26, 1928.

Article 14, Amendments to the United States Constitution, as follows:

“ * * * nor shall any state deprive any person of
* * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

The Superior Court of Maricopa County, State of Arizona, aided and abetted by the Supreme Court of the State of Arizona, without due process of law, and without any process of law, arbitrarily took from this petitioner land of a value of far in excess of \$3,000.00 exclusive of interest and costs (R. 9), (R. 10), (P. 11 of Record, Section 9), (R. 13).

It is against Public Policy to sell land of a value in excess of \$3,000.00, exclusive of interest and costs, for a paltry sum of \$126.65, even had there been such a cost judgment in existence, and the court, itself, in its order of December 8, 1943, said it was merely a “PURPORTED” sale (R. 26).

The Supreme Court of Arizona had no right to dismiss any appeal duly brought before it, nor any right to deny a Petition for Rehearing duly filed, which is now before this Tribunal.

The right of appeal is inherent in any state in the Union. When the appeal is from an Order of the Court that is in the nature of a Final Judgment the time of that Final Judgment can not be reached until no recourse is left to the loser excepting an appeal to a higher court. If it were possible for the loser to make any further effort to save himself the final order would not have been reached. Therefore the

United States Supreme Court has jurisdiction to review the dismissal.

Even had there ever been any Cost Judgment the respondents would have been compelled to file evidence in court that they had complied with—

Section 62-101 of the Arizona Code Annotated, 1939, before the Sheriff could sell, or even purport to sell, any land, whatever, owned by this petitioner. As they failed to comply with the State law they took the land, Without Due Process of Law, and Denied to This Petitioner the Equal Protection of the Laws, such as is required by: Article 14, Amendments to the Constitution of the United States.

Appellant was also denied Due Process of Law when an Order to Confirm the Sale was made by an alien judge (R. 7).

Questions Presented

1. Can the courts of a state violate its own laws which require the search for personal property, and the exhaustion of its value, before real estate can be levied upon for the payment of a debt?
2. Can a judge of an alien division confirm a sale of real estate in violation of the Rules of Civil Procedure adopted under the Statutes of the State, and without the knowledge of the owner that a Hearing on Confirmation is to be held?
3. Can the courts give land to private individuals who have no lien, or claim, of any kind, upon the land, without due process of law, or any process of law?
4. Can the Supreme Court of Arizona refuse to hear an appeal on a final order when the Statutes provide that any court order made after Judgment, that affects a substantial right, is appealable, and deny to any litigant the right to file a motion, or petition, for a rehearing?

5. Is any decree final, and closed, until after the motion, or petition, for a rehearing, is acted upon by the court?

Reasons for Allowance of Writ

First Reason

The Superior Court of Maricopa County, State of Arizona, aided and abetted by the Supreme Court of the State of Arizona, deprived the petitioner of her land without

Due Process of Law and Without Compensation

Second Reason

The Superior Court of Maricopa County, State of Arizona, aided and abetted by the Supreme Court of the State of Arizona, Denied to this petitioner

The Equal Protection of the Law Accorded to Others Similarly Situated

Third Reason

Public Policy was abrogated when the Supreme Court of Arizona flouted its own Rules of Civil Procedure, and the Statutes of Arizona, and sanctioned the taking of land from the petitioner, to the enrichment of the respondents, regardless of illegalities.

BRIEF

There was no Opinion filed by the State Supreme Court.

May 24, 1944—The Clerk of the Superior Court transmitted the Record on Appeal to the State Supreme Court. The Minute Entry of March 24, 1944 (Page 27, of the Record) shows that the presiding judge, of the lower court, himself, set the date of transmission “* * * to and including May 24, 1944.”

June 23, 1944—The Filing fee of \$25.00 was paid and the Abstract of Record filed in the Supreme Court.

The Opening Brief was due 30 days after filing the Abstract, but petitioner asked for an extension of time to August 30, 1944, in which to file the Opening Brief, because of typewriter trouble, to which no objection was made, therefore;

August 21, 1944, the Opening Brief was filed.

The Respondents' was due in 30 days from the filing of the Opening Brief.

September 19, 1944—Instead of filing their brief the Respondents filed a Motion to Dismiss the Appeal, and also filed a Motion for an Extension of Time in which to file their Brief.

September 25, 1944—Appellant Mosher filed her Motion:

"IN REPLY TO APPELLEES' MOTION TO DISMISS."

September 25, 1944—The Supreme Court dismissed the appeal.

A Petition for a Rehearing was duly filed and:

October 23, 1944—The Petition for a Rehearing was denied.

* * * * *

For the Jurisdiction of the case petitioner quotes from an Opinion by Chief Justice Hughes, given in:

Cases Nos. 6 and 7, October Term, 1932:

"* * * attempting to take and appropriate the property of plaintiff without compensation and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, * * * or any process of law, * * * and in violation of the rights of plaintiff as guaranteed her under the Constitution of the United States, and par-

ticularly under amendments five and fourteen thereof,
* * * ,”

The citations and facts upon which petitioner relies to invoke the jurisdiction of the Supreme Court of the United States are set forth in the Statement of Jurisdiction (Page 3).

The facts are set forth in the Statement of Matter Involved (Page 2).

Errors Based on Questions Presented Herein

Page 5

1. It was error for the lower court to refuse to set aside a sale of real estate made by a sheriff who levied thereon without first searching for personal property to satisfy the judgment.

It was error for the Supreme Court to refuse to set aside the Illegal Levy. Even had there been a judgment the purported sheriff's sale was a nullity and void.

2. It was error for an alien judge who had no jurisdiction over the subject matter to sign an "Order of Confirmation" (Page 7 Record). It was error for the judge to hold a Hearing without Notice to the real estate owner.

3. It was error for the lower court, aided and abetted by the Supreme Court to take possession of the land of petitioner and gratuitously donate it to the respondents.

4. It was error for the Supreme Court of the State of Arizona to refuse to hear an appeal based on a final order that the statutes allowed filed in the lower court, and to deny to any litigant the right to file a motion, or petition, for a rehearing.

5. It was error for the Supreme Court to deny to this petitioner the inherent right, and privilege, of using every possible effort, and means, ethical and legal, to prevent the loss of her vested estate, such as is accorded by the courts of every commonwealth in the Union to all of its peoples.

Argument

First Question and Error

It was error for the Sheriff to levy upon real estate without first making a search for personal property to satisfy a judgment, even if there had been a judgment instead of what the court itself designated as merely a "Purported Judgment" (R. 26). Likewise no court can set aside "illegalities" by christening them "irregularities" (R. 26) and (R. 14). The act of the Sheriff in levying upon a certain tract of land was obviously in furtherance of the "Yen" set forth on page 12, of the Record and page 12, when he carefully shut his eyes to:

Section 24-103, in volume 2, of the Arizona Code Annotated, 1939, which recites—

"Contents of general execution—Against personal property first. A general execution shall state the amount of the judgment and costs, and the amount due thereon, and shall require the officer:

If it be against the property of the judgment debtor to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property can not be found, then out of his real property * * *."

Petitioner has been unable to find one single citation, either in Arizona, or any other state in the Union, where

any court upheld a levy on real estate without a search for personal property, thus denying to this petitioner:

Due process of the law and the equal protection of the law accorded to others similarly situated.

Second Question and Error

It was error for an alien judge to sign an Order of Confirmation of a sheriff's sale (R. 7). The Order Amending Writ of Execution was signed by Dudley W. Windes, Judge (R. 3). The original execution was never filed with the court clerk. The Sheriff returned merely an "Execution" (R. 3). This was not Witnessed by any judge. See line 1 (R. 4). The Supplemental Rules, Rule VI sets forth how Transfers of cases are made. Rule III sets forth how they are assigned. It is clear that only one judge has jurisdiction and that no transfer was ever made in the case at bar. From the Record it is impossible to know who that judge was. The captions of the different papers merely recite—"No. 46218". There are five (5) divisions in the Maricopa County Court, and five (5) judges. Each judge a fixture in his especial division. The lack of definite jurisdiction is set forth on page 12 of the Record, viz:

"Paragraph II—That the Rules of the Superior Court require the filing of all Motions of either party in a Special Division, but, as all papers from the Praeipie for Execution through the various and sundry perambulations of Wayland, Holmes and Webb, in their efforts to make a profit, and also to secure a certain, and designated, tract of land; which for some reasons unknown to these undersigned victims, they seem to have a "Yen" for; a slang "Yen" not a Japanese "yen"; although the price they are attempting to allot for its purchase would be approximately that of a Japanese "Yen" before "Pearl Harbor"; have all been filed anonymously, with no designated Division of the Court set forth, and thus have "Gone With the

"Wind" sometimes into one court and sometimes into various and sundry other Divisions, the undersigned is compelled to resort to the same anonymity for the reason we do "not know where we are at" and will have to leave it to the Clerk's decision as the War Regulations seem to keep our designation secret.

H. L. MOSHER, *in Person.*"

However, at "long last", when Strouss, and his satellites, Mark Wilner and Frank L. Snell, obviously considered that they must have a judge who would assist them in their laudable efforts to retain the land the sheriff had presented to them, in filing their "Memo", see page 15, of the Record, they filed it in Division 5.

Record page 20, sets forth petitioner's Reply to Defendants' Memo, as follows:

"The above entitled Court and Charles L. Strouss will please Take Notice that the undersigned are merely following the lead of the battery of noted attorneys appearing against them when they set forth Division 5, in this Reply, as the Memo of defendants is the first time that any Division of the Superior Court has been set forth in the matter of an execution procured anonymously from the Clerk of the Court. They do not know whether the position now taken by the defendants that they have "Executed" in Division 5 is correct or not."

Rule I (c) of the Rules of Civil Procedure, which are, in effect, the new Federal Rules, were empowered in Chapter 8, Senate Bill No. 26, Approved February 4, 1939. Going into effect January 1, 1940. The Supplemental Rules, going into effect July 1, 1943, in Rule I, and Rule VI, definitely fix the Division of an action. Rule VI sets forth the only way transfers can be made. Therefore, this action has "Gone With the Wind" until respondents, obviously, when their acquirement of land Without Due Process of Law

and Without Compensation was in danger of wrecking on the rocks selected the judge who they thought was their best chance to keep their donation.

In addition to the before set out illegalities petitioner was given no Notice that a Hearing on the Confirmation was to be held. As stated on page 20, of the Record:

“However the execution was for a judgment in the Superior Court and H. L. Mosher represented herself in that court. She had no Notice of the Petition for Confirmation.”

The Hearing on Confirmation was set for August 2, 1943, with no division given. (R. 7). The Order of Confirmation was signed at the Hearing, the same day. The Judge gave no division. The Minute Entry of August 2, 1943 (R. 26) shows that no one was present at the Hearing but Attorney Strauss, who filed the Order of Confirmation at 10:46 A. M. the same day it was signed, (R. 8).

Third Question and Error

The Question of whether any Court in the Union can grasp in its fist the land of any private individual and toss that land, gratuitously, to another private individual, is so well settled from a time to which the memory of man goeth not, that argument, would be superfluous, and absurd. A private man can not even condemn land, and pay for it, for any use, or purpose, whatever.

Fourth Question and Error

It was the rankest error, and a Denial of the Equal Protection of the Law, for the Supreme Court to refuse to hear the appeal.

Section 21-1702 Arizona Code Annotated 1939, provides:

"Judgments and orders reviewable. * * * from any special order made after final judgment * * * From a final order affecting a substantial right made in a special proceedings or upon a summary application in an action after judgment."

In Baneroff's Code Practice and Remedies, Volume 8, Page 8329, Paragraph 6270, it says:

"A judgment which puts an end to the action * * * leaving nothing further for the court pronouncing it to do * * *" and in Paragraph 6271, Baneroff continues:

"* * * Is the order or decree one which determines the right of the parties so that no further question can arise before the court rendering it, * * *."

The order in the instant case of December 8, 1943, (R. 26), was not one that left "nothing further for the court pronouncing it to do". The court could have granted another Hearing, or the court could have entered another order setting aside the sale. It was the absolute duty of the petitioner to point out to the court wherein the court had erred in denying the motion to set aside the sheriff's sale on the sole ground that irregularities had been waived. Illegality is not irregularities (R. 14). Where nothing existed to be waived nothing could be waived. Illegality is something against the law and no law can be waived. No matter what any person does he cannot be deprived of the protection of the law.

The order of December 8, 1943, was not final as it left something further that could be done.

The order of December 27, 1943, was certainly final. This petitioner had nothing further that she could possibly do when the court announced that it would give her nothing further to do and would not give her any further consider-

ation, virtually slamming the door in her face. Its act was Final.

Fifth Question and Error

No order, or decree is final when the Statutes and Rules of the court allow a motion, or petition, for a rehearing, to be presented for the court's consideration. Such must be acted upon by the court. It cannot be struck from the calendar. The Statutes allow its filing and that the court act upon it. In the instant case a petition for rehearing was filed and denied. The denial was the final act of the court.

Summary

Your petitioner is relying upon her contention that the Abstract of Record and the Certified papers from the Arizona Supreme Court show that from the beginning of the present action, as instigated by the Praeipie for a judgment that did not exist, (R. 1), up to the Refusal of the Supreme Court to consider the appeal, and its untoward dismissal thereof, neither the lower court, nor the court of last resort, abided by the statutes of Arizona, the Constitution of the State of Arizona, and flouted, beyond credence, the Constitution of the United States of North America.

This petitioner is convinced that never before, in the annals of jurisprudence, was land taken for a judgment that did not exist, taken without one penny being paid therefor, either directly, or indirectly, without claim, or pretense of claim, thereon, without due, or any, process of law, and without compensation.

Wherefore, petitioner prays that the order confirming the sale of the realty, signed August 2, 1943, see page 7, of Record; the order of December 27, 1943, page 26 of the Record; and the order dismissing the appeal made by the Supreme Court of Arizona September 25, 1944, be reversed, revoked, annulled, and that the property sold on the Pur-

ported execution sale be restored to her and orders issued herein to attain this result, when the clerk of the state court certifies it's proceedings to the Clerk of the Supreme Court of the United States, and for such other, and further, relief to which this petitioner may be entitled, and she will forever pray.

Respectfully submitted,

H. L. MOSHER,

Petitioner,

Address 313 North Center Street,

Phoenix, Arizona.

THOS. O. MARLAR,

Attorney for Petitioner.

(6729)



33

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CHARLES ELMORE DROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

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H. L. MOSHIER,

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

**SNELL, STROUSS & WILMER
CHARLES L. STROUSS**

Counsel for Respondents,

**W. R. Wayland, Fred G. Holmes,
and Del E. Webb.**



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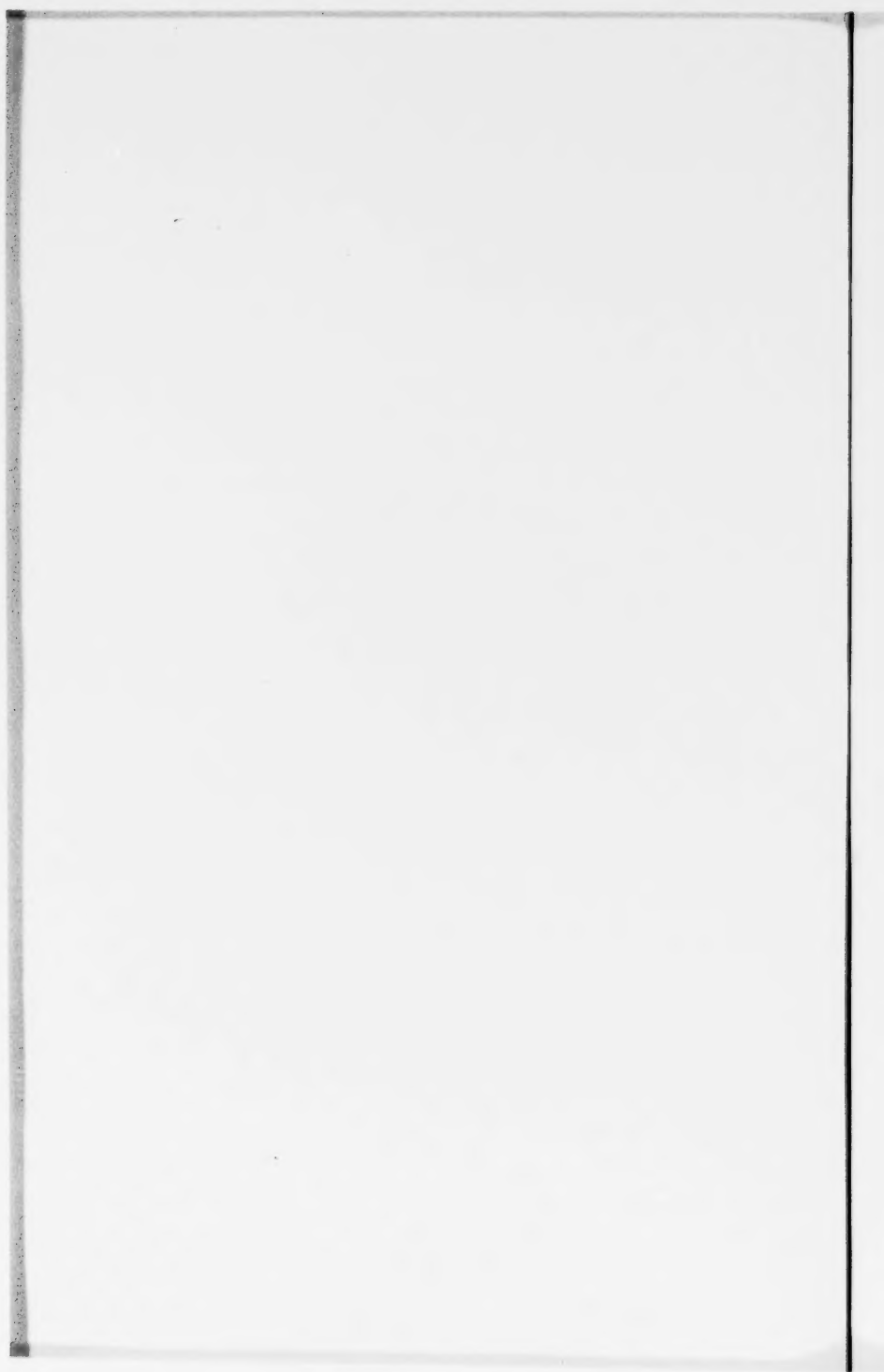


TOPIC INDEX

| | Page |
|-----------------------------|------|
| ARGUMENT | 3 |
| CONCLUSION | 4 |
| OPINIONS BELOW | 1 |
| STATEMENT OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 3 |

CASE INDEX

| | Page |
|---|------|
| Chapell Chem. etc. Co. v. Virginia etc. Mines Co., 172 U. S. 472 | 4 |
| Coyle v. Smith 221 U. S. 559 | 4 |
| John v. Paullin, 231 U. S. 583 | 4 |
| Newman v. Gates, 204 U. S. 89 | 4 |



SUPREME COURT OF THE UNITED STATES

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

No opinion was filed in either the Superior Court in and for the County of Maricopa, Arizona, nor in the Supreme Court of Arizona.

Statement of the Case

On May 19, 1943, respondents caused a Writ of Execution to be issued upon a judgment in their favor in the amount of \$126.65 against H. L. Moshier (the petitioner herein), James Dean Collins and Julia C. Collins. (Fol. 1 p 1) The Writ of Execution was duly and regularly levied on what is commonly referred to as the South one-half of Lot 8, Block 1,

Churchill Addition to the City of Phoenix, Maricopa County, Arizona. On June 22, 1943, after due and proper proceedings, the property was sold on execution sale to the respondents for the sum of \$148.45. The sheriff's return of sale on execution was filed July 25, 1943. (Fol. 11-12, p 4).

On July 26, 1943, the respondents filed a motion for confirmation of the sale, and on the 2nd day of August, 1943, the court entered its order confirming and approving the sale. (Fol. 71, p 26).

On September 2, 1943, respondents paid city, county and state taxes against the property totalling \$1045.52. (Fol. 43, p 16).

On November 22, 1943, petitioner filed her motion to set aside the sale and execution. (Fol. 24, p 8).

In response to the motion respondents offered to permit petitioner to redeem the property if she would refund to respondents the money respondents had paid out. (Purchase price \$148.45; taxes \$1045.52; total \$1193.97). (Fol. 43, p 16). This petitioner refused to do. The motion to vacate the sale was denied. (Fol. 72, p 26). On December 18, 1943, petitioner filed a motion for rehearing of the motion to vacate the execution sale. (Fol. 38, p 14). This motion was denied December 21, 1943. (Fol. 73, p 16).

On February 25, 1944, petitioner filed notice of appeal to the Supreme Court of Arizona. (Fol. 60, p 22).

September 19, 1944, respondents filed in the Supreme Court of Arizona their motion to dismiss the appeal on the ground that if the appeal was from the order of the trial court dated December 8, 1943, it was not taken within the 60 days from the date of the order as required by Section 21-1801 Arizona Code, 1939, and if from the order of December 27, 1943, the appeal was not from an appealable order. (Fol. 78, p 29).

The motion to dismiss was granted by the Supreme Court of Arizona September 25, 1944. (Fol. 82a, p 31). Petitioner's petition for rehearing was denied October 23, 1944. (Fol. 85, p 33).

Summary of Argument

The Petition should be denied because:

1. The order of the State Supreme Court dismissing the appeal to that court determined a matter of purely local law and is conclusive; no federal question is presented by the petition.

Argument

The Petition should be denied because:

The order of dismissal by the State Supreme Court determined a matter of purely local law and is conclusive; no federal question is presented by the petition.

The Petition herein seeks a review by this Court of an order of the Supreme Court of Arizona dismissing petitioner's appeal to that court because not within the statutes of Arizona providing for appeals.

The mode of appealing from judgments of a state subordinate court to the State Supreme Court is a matter of local concern only.

Coyle v. Smith, 221 U. S. 559;
55 L.Ed. 853; 31 S.Ct. 688.

John v. Paullin, 231 U. S. 583;
58 L.Ed. 381; 34 S.Ct. 178.

An order of a State Supreme Court dismissing an appeal from a subordinate court because not in conformity with the state statutes governing appeals determines a matter of local concern only, presents no federal question, and is not reviewable by this Court.

Coyle v. Smith, supra.

John v. Paullin, supra.

Newman v. Gates, 204 U. S. 89;
51 L.Ed. 385; 27 S.Ct. 220;

Chapell Chem. etc. Co. v.

Virginia etc. Mines Co.,

172 U. S. 472;

43 L.Ed. 520; 19 S.Ct. 268.

Conclusion

It is respectfully submitted that the Petition should be denied.

Respectfully submitted,
SNELL, STROUSS & WILMER,
CHARLES L. STROUSS
703 Heard Building,
Phoenix, Arizona.

End

